KEDAH MARBLE SDN BHD

v.

JAAFAR MOHAMED & ANOR

HIGH COURT MALAYA, ALOR SETAR
VINCENT NG J
[ORIGINATING MOTION NO: 25-15-2000]
26 FEBRUARY 2001

ADMINISTRATIVE LAW: *Remedies - Certiorari, application for - Whether Industrial Court erred in coming to its decision - Whether application constituted an appeal - Supervisory jurisdiction of High Court*

By an award handed down, the Industrial Court (the second respondent) had held that Kedah Marble Sdn Bhd (the applicant) had unjustly dismissed Jaafar Mohamed (the first respondent). Dissatisfied, the applicant applied for the writ of *certiorari* to quash the said award. It was submitted that the Industrial Court had committed several errors of law and had taken into account irrelevant factors or omitted to consider relevant factors in coming to its decision.

Held:

[1] The fact that the High Court may come to a different conclusion from that of the Industrial Court does not mean that the decision of the Industrial Court is illegal and/or irrational.

[2] The Industrial Court had carried out its duty according to law and there was no merit in the instant application as it constituted more of an appeal on facts, rather than an application for review.

[3] To allow a review on findings of fact based on the credibility of witnesses is to allow the High Court to be used as an appellate court in *certiorari* proceedings to entertain what is, in effect, an appeal against findings of fact.

[4] On the allegation of misconduct, the Industrial Court had properly evaluated the evidence before it and its finding in the circumstances was fair. The applicant had failed to produce the relevant witness in question nor did it tender sufficient evidence to substantiate this contention. The first respondent's averments were not challenged or rebutted by the applicant.

[5] The Industrial Court had applied the necessary principles in evaluating the allegation of poor performance and had properly concluded that the applicant had not proven that the first respondent was a poor performer.

[6] The Industrial Court's finding that there was no act of insubordination was correctly based on the evidence before it.

[7] The Industrial Court had not erred in law or acted in excess of its jurisdiction in handing down its award.

[Application dismissed.]

Case(s) referred to:

Airspace Management Services Sdn Bhd v. Col (B) Harbans Singh Chingar Singh [2000] 4 CLJ 77 ***(foll)***

Earl v. Slater & Wheeler (Airline) Ltd [1973] 1 All ER 145 ***(refd)***

Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor [1996] 4 CLJ 687 ***(refd)***

Malayawata Steel Bhd v. Mohd Yusof Abu Bakar & Anor [1994] 2 CLJ 239 ***(refd)***

Milan Auto Sdn Bhd v. Wong Seh Yen [1995] 4 CLJ 449 ***(foll)***

National Union of Plantations Workers v. Kumpulan Jerai Sdn Bhd, Rengam [2000] 1 CLJ 681 ***(foll)***

Petroleum Nasional Bhd v. Nik Ramli Nik Hassan [2000] 2 CLJ 244 ***(refd)***

Quah Swee Khoon v. Sime Darby Bhd [2001] 1 CLJ 9 ***(foll)***

Legislation referred to:

Courts of Judicature Act 1964, para 1 sch

Rules of the High Court 1980, O. 53

For the applicant - Trevor De Silva; M/s Shook Lin & Bok

For the 1st respondent - Pravin Kaur Jessy; M/s Jessy & Assoc

For the 2nd respondent - Lukman Zainuddin FC

Reported by Bhawani Mano

JUDGMENT

Vincent Ng J:

This is an application (encl. 1) by Kedah Marble Sdn Bhd (applicant) for an order of *certiorari* to bring up and quash Industrial Court award no. 264 of 2000 (the award) made by the second respondent (the Industrial Court) on 15 May 2000 in favour of the first respondent. This application is supported by the affidavits of Katijah @ Chekotijah bte Che Omar affirmed on 24 June 2000 (encl. 2) and 19 October 2000 (encl. 13) and the statement pursuant to O. 53 Rules of the High Court 1980 (encl. 3). The first respondent opposes this application *vide* his affidavit in reply affirmed on 16 October 2000 (encl.

12). The Industrial Court's notes of evidence is exhibited in encl. 13, while the various cause-papers/documents dealt with by the Industrial Court are to be found in encl. 2. The second respondent did not file any affidavit although all the relevant cause-papers have been duly served and received by the Attorney General's Chambers, for and on behalf of the former. As it would also be referred to in my grounds of judgment, I shall now state in toto the grounds of the application as contained in the applicant's statement pursuant to O. 53 Rules of the High Court 1980 (RHC).

Statement Under O. 53 Rules Of The High Court 1980

The grounds on which the relief is sought is as follows:

(1) The Industrial Court acted in error of law and in excess of jurisdiction when it concluded in its award that the dismissal of the first respondent was without just cause and excuse when, based on all the evidence before it, especially the documents, testimonies and various admissions elicited from the first respondent during the trial, no reasonable tribunal so placed would have arrived at a similar conclusion.

(2) The Industrial Court acted in error of law and in excess of jurisdiction when, as is apparent from the said award, it seemingly confined itself mainly or substantially to the evidence, issues and submissions raised by the first respondent and did not consider and take into account, sufficiently or at all, the evidence, issues and submissions raised by the applicant, before determining whether the applicant had just cause and excuse in dismissing the first respondent. Further, in so doing, the Industrial Court took into account irrelevant matters in making its award and/or failed to properly appreciate, or at all, the evidence, issues and submissions of the applicant.

(3) The Industrial Court acted in error of law and in excess of jurisdiction when it took approximately one and a half years to decide in the matter and in failing to identify and set out in the award, the basis upon which it purported to reject the several contentions of the applicant relating to the misconduct and poor performance of the first respondent, who was at all material times, the applicant's industrial relations manager and personnel and administration manager, and flowing therefrom, the contention that the dismissal of the first respondent was with just cause and excuse. In the circumstances, the decision making process of the Industrial Court and the subsequent said award was vitiated in law.

(4) The Industrial Court acted in error of law and in excess of jurisdiction when it shallowly stated that "basically the company's complaint against the claimant is failing to prepare the organization chart, failing to punch the punch card, failing to maintain a new filing system and failing to prepare the performance appraisal" (pp. 6-7 of the said award) when in fact, a reading of the statement in reply and the applicant's written submissions would have clearly revealed that the applicant's allegations of misconduct against the first respondent who was the applicant's industrial relations manager and personnel and administration manager, comprised, *inter alia*, of insubordination, breaching and/or deviating from the applicant's rules and regulations, absenteeism and lateness and poor performance. In the circumstances, the Industrial Court, in making its award, failed to take into account relevant evidence, issues and considerations which thereby vitiated the ultimate finding of the Industrial Court.

(5) The Industrial Court acted in error of law and in excess of jurisdiction in reaching the conclusion, on the issues of the organization chart, job descriptions and performance appraisal, that these must be taken to have been given by the first respondent to the applicant considering the first respondent's explanation given only at the trial, when all along, although numerous memos and reminders were sent to the first respondent requesting the said documents, the first respondent had at no time given any explanation whatsoever. In the circumstances, the Industrial Court ought to have properly considered the issue of why, if in fact, the first respondent, who was the applicant's industrial relations manager and personnel and administration manager, had valid explanations for these documents (which are denied), did he not at anytime then reply to the applicant's various memos and reminders stating his purported explanations as such.

(6) Further to para. 4 above, the Industrial Court acted in error of law and in excess of jurisdiction when, on the one hand, it purported to consider and accept the first respondent's version and explanation on the said documents and yet, on the other hand, held against the first respondent in that as the applicant's witness COW1 was admittedly the right witness to testify on the issue and she was never asked whether the first respondent's "story" was true, the first respondent's failure was to be taken as acceptance of the truth of that part of the witness's evidence. In the circumstances, the said award is fundamentally contradictory in parts and clearly superficial in its reasoning, analysis and determination of the issues before it.

(7) The Industrial Court therefore acted in error of law and in excess of jurisdiction when, on nearly all the issues, it considered the first respondent's version and explanation without first considering the entire evidence and submissions relating to the issues and more particularly, the applicant's submission at the outset that, *inter alia*, as the first respondent, who was the applicant's industrial relations manager and personnel and administration manager, had in fact been untruthful and lied in his letter dated 4 April 1996, his evidence ought to be treated with caution and reservation on all the other issues.

(8) Following from para. (6) above, Industrial Court acted in error of law and in excess of jurisdiction when notwithstanding the clear, uncontroverted and unchallenged evidence produced at the trial that the first respondent had been untruthful and lied *vide* his letter dated 4 April 1996 and the applicant's submissions at the outset that the first respondent's evidence ought therefore to be treated with caution and reservation, the Industrial Court failed to consider this most material issue sufficiently and/or give it due weight and regard, or at all, in arriving at its conclusions in the said award.

(9) The Industrial Court acted in error of law in excess of jurisdiction in failing to consider properly all the evidence and submissions relating to the applicant's complaint against the first respondent with regard to his failure to consistently "punch" his punch card and in fact hand-writing in the times of entry or exit instead of machine-validating the same. Instead, here again the Industrial Court failed to consider sufficiently or at all the answers/admissions made by the first respondent, who was the applicant's industrial relations manager and personnel and administration manager, during the trial *inter alia*, that he fully knew and was bound by his own written directive *vide* memo dated 30 January 1996 sent to all the other staff, of the applicant's requirement and regulation to "punch-in". Notwithstanding that, and the clear admissions by the first respondent, *inter alia*, in cross-examination that: "Notwithstanding my own memo, I continued not to punch in. Not only did I not punch in but I hand wrote times of coming in and going out on these cards," the Industrial Court totally missed the point when it held that it was "normal for any person in his capacity and duty to come to office late."

(10) The Industrial Court acted in error of law and in excess of jurisdiction when it failed to sufficiently consider, or at all, the applicant's evidence and submissions with regards the issue of the "punch-card", absenteeism and late-coming and instead abdicated its duties and functions when it

proceeded to consider and hold that, from only the March 1996 punch-card of the applicant's general manager COW1, she had not punched in and out on several occasions, therefore she was "also equally guilty of such conduct." This is entirely notwithstanding the fact that COW1 had clearly explained her reasons for such.

(11) The Industrial Court acted in error of law and exceeded its jurisdiction when it failed to apply the correct principles of law in relation to the burden that was on the first respondent, who was the applicant's industrial relations manager and personnel and administration manager, to prove his assertions on all issues and instead wrongly reversed such burden/obligations of proof onto the applicant.

(12) As such, considering all the evidence, submissions and issues on the "punch-card", absenteeism and lateness issue and the first respondent's wilful hand-writing on the same, the decision of the Industrial Court was in fact perverse and was therefore not a decision that would have been reached by a tribunal similarly circumstanced.

(13) The Industrial Court acted in error of law and in excess of jurisdiction when it held that the applicant was practising "double-standards" and "there seems to be inconsistent practices within the company" when, in all the circumstances of the case, and in view of the evidence adduced at the trial, no such evidence or sufficient evidence existed to so justify such a conclusion to be made.

(14) The Industrial Court acted in error of law and in excess of jurisdiction when it failed to consider sufficiently or at all, the evidence, submissions and issues raised by the applicant against the first respondent on the issue of insubordination. In particular, in the light of the incessant failure and refusal of the first respondent, who was the applicant's industrial relations manager and personnel and administration manager, to reply, answer or respond, in time or at all, to the various memos sent by the applicant's general manager and more particularly, in the light of the discourteous and acrimonious letters/memo sent by the first respondent to his superior, the general manager, the Industrial Court totally failed to appreciate the evidence and submissions when it failed to hold that the first respondent was guilty of insubordination.

(15) Following from para. (13) above, the Industrial Court further acted in error of law and in excess of jurisdiction when, despite the clear evidence adduced at the trial that the first respondent, who was the applicant's industrial relations manager and personnel and administration manager, refused to obey and respond to the general manager and had

in fact deemed it fit to question, evaluate and qualify the instructions given to him by his superior. In this regard, notwithstanding the various admissions made by the first respondent at the trial that as industrial relations manager and personnel and administration manager, it was insubordination not to respond to instructions from a superior if they were reasonable and fair, the Industrial Court was inherently wrong and abdicated its duties and functions when it failed to consider all these issues sufficiently or at all and instead simply held that as the first respondent had a right to complain against his superior and make remarks provided they were done *bona fide*.

(16) The Industrial Court committed an error of law and exceeded its jurisdiction when, notwithstanding the applicant's submission that, in law, it was incumbent on the first respondent to properly plead its case and properly put its case in cross-examination of the applicant's witness. In failing to so sufficiently or at all, the Industrial Court ought to have held, on the evidence, submissions and issues before it, that the first respondent must be taken to have accepted the evidence put forward by the applicant.

(17) Following from para. (15) above, the Industrial Court acted in error of law and in excess of jurisdiction when it not only allowed but considered the evidence and issues raised by the first respondent when these issues were not before the court and had not been put to the applicant's witnesses in cross-examination and as a result, the applicant would not be in a position to lead evidence to rebutt the same.

(18) The Industrial Court acted in error of law and exceeded its jurisdiction when it considered the repossession of the applicant's car as having caused him embarrassment when, on the facts, there was sufficient evidence to show that the same was without any wrongdoing on the part of the applicant and was in fact as a result of cash-flow problems then faced by the applicant.

(19) The Industrial Court further acted in error of law and exceeded its jurisdiction when it failed to hold, on the facts, that the first respondent was in fact guilty of poor-performance in failing and/or refusing to discharge his duties and functions properly as industrial relations manager and personnel and administration manager.

(20) The decision of the Industrial Court to order payment of back wages, compensation in lieu of reinstatement and "all other benefits and bonus for the said period" was irrational and perverse in as much as the first respondent's claim was not supported by the evidence adduced at the

trial and/or any evidence at all and was unreasonable in all the circumstances of the case as it was without any foundation in law or fact and further was unsupported by evidence. (Dated this 24 June 2000).

The Law

Numerous case authorities have set out trite law pertaining to the extent of the High Court's power to review the Industrial Court's decision. Such trite law has been amply and clearly laid out in the following three cases, which I am bound to follow: *Quah Swee Khoon v. Sime Darby Bhd* [2001] 1 CLJ 9, *Airspace Management Services Sdn Bhd v. Col (B) Harbans Singh a/l Chingar Singh* [2000] 4 CLJ 77 and *National Union of Plantations Workers v. Kumpulan Jerai Sdn Bhd* [2000] 1 CLJ 681. In *Quah Swee Khoon* it was held that:

> It is not open for a Court in judicial review proceedings to exercise appellate powers. If a judge to whom an application is made for *certiorari* inquires into and disturbs finding of facts based on the credibility of witnesses, he is actually exercising appellate functions. Therefore, it must be concluded that the finding of perversity is merely a guise for interfering with findings that are only capable of being corrected in the exercise of appellate jurisdiction. As such, the learned judge had clearly exceeded the parameters of its *certiorari* jurisdiction in quashing the award on this ground.

In similar vein, in *Airspace Management Services Sdn Bhd*, the dicta of the Court of Appeal reads as follows (at p. 85):

> Finally, there is the case of *William Jacks & Co (M) Sdn Bhd v. S Balasingam* [1997] 3 AMR 2585, a decision of this court where the following observation was made in regard to the exercise of the review jurisdiction (at p. 2589):
>
> > *It is well-settled that a court cannot utilize certiorari proceedings as a cloak to entertain what, in truth, is an appeal against findings of fact.* If authority is needed for that proposition, it may be found in the decision of the Indian Supreme Court in *Basappa v. Nagappa* AIR [1954] SC 440 and in *Dharangadhru Chemical Works Ltd v. State of Saurashtra & Ors* AIR [1957] SC 264. In response to this proposition, Mr. Sivabalah refers us to the decision of this court in *Amanah Butler (M) Sdn Bhd v. Yike Chee Wah* [1997] 2 AMR 1653; [1997] 2 CLJ 79 and the decision of the Federal Court in *Rama Chandran*. I am conscious of the inroad made by these decisions in the field of administrative law. The principle they establish is that when a decision of an inferior tribunal is attacked in public law proceedings for unreasonableness, the inquiry extends to the merits of the decision itself. The question at the end of the day is whether a reasonable tribunal similarly circumstanced would have come to a like decision on the facts before it. *However widely understood the proposition in Rama Chandran and Amanah Butler may be, it does not include the review, in certiorari proceedings, of findings of fact based on the credibility of witnesses.*

> The authorities therefore establish a clear distinction between cases involving a review of facts as found by the Industrial Court based on the credibility of witnesses and those where no such exercise is involved. Cases where intervention has taken place, such as, *Rama Chandran (supra)* and those decisions that followed it fall into two categories. The first category comprises of cases where what is undertaken is an objective assessment of the reasonableness of the Industrial Court's decision based on the facts as found by the Industrial Court. The second are cases where the Industrial Court failed to have regard to the issues raised by the parties or took into account some irrelevant consideration in arriving at its conclusion, apart from any specific findings of fact based on the credibility of witnesses. *But where the Industrial Court has accepted or rejected the evidence of a particular witness and gone on to make a finding based on such acceptance or rejection, the High Court is bound to accept such finding*. (emphasis added).

The role of a High Court when exercising the powers conferred upon it by para. 1 of the Schedule to the Courts of Judicature Act 1964 in the context of public law was explained by the Federal Court in *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor* [1996] 4 CLJ 687 (at p. 714) as follows:

> The true principle governing the grant of prerogative relief appears in the following passage in the judgment of Bose J in *Sangram Singh v. Election Tribunal* AIR [1955] SC 425 at p. 429:
>
> > That, however, is not to say that the jurisdiction will be exercised whenever there is an error of law. The High Courts do not, and should not, act as Courts of Appeal under Art 226. Their powers are purely discretionary and though no limits can be placed upon that discretion it must be exercised along recognized lines and not arbitrarily: and *one of the limitations imposed by the courts upon themselves is that they will not exercise jurisdiction in this class of case unless substantial injustice has ensued or is likely to ensue. They will not allow themselves to be turned into courts of appeal or revision to set right mere errors of law which do not occasion injustice in a broad and general sense.* (emphasis added).

In *Kumpulan Jerai (supra)*, trite law was again restated with clarity, that:

> In the circumstances it was **wrong for the learned judge, in a supervisory role to substitute his own finding of fact when such role is much within the province of the Industrial Court**. On the evidence before it, the Industrial Court was more than justified to come to such finding of fact and to its assessment of the credibility of the estate manager. (emphasis added).

Even though a judge of the High Court may conclude that it may not have reached a similar conclusion as the Industrial Court did, yet nevertheless, it does not render the decision of second respondent illegal and/or irrational. In *Earl v. Slater & Wheeler (Airline) Ltd* [1973] 1 All ER 145, the National Industrial Relations Court held:

> The subsection goes on to provide that this question 'shall be determined in accordance with equity and the substantial merits of the case.' This does not, in our judgment mean that the principle of 'equity' as contrasted with the 'common law' are applicable as such, but rather that in considering whether the employer acted reasonably or unreasonably the tribunal should adopt a broad approach of common sense and common fairness, eschewing all legal or other technicality. In other words they should constitute themselves an industrial 'special jury.' *Provided that they do so, that they ask themselves the right questions and that the evidence is such that they could properly reach their conclusion, this court will have neither the wish nor the right to vary their decision even if, exceptionally it may doubt whether it would have reached the same decision.* (emphasis added).

Indeed, in *Petroliam Nasional Bhd. v. Nik Ramli Nik Hassan* [2000] 2 CLJ 244 our own Court of Appeal have been more forthright and took the issue of findings of facts of the Industrial Court even a step further when it said (at p. 87 para. G to I) that:

> He has submitted, quite rightly, that once the Industrial Court made an evaluation rightly or wrongly and had arrived at a finding of fact, that finding was immunized from judicial review (See also the *State of Madras v. G. Sundaram* AIR [1965] SC 103, *William, Jacks & Co. (M) Sdn. Bhd. v. S. Balsingam* [1997] 3 CLJ 235; [1997] 3 AMR 2585.

The Instant Case

Having gone through all the available documents filed by the applicant in this case and heard counsel and read their submissions, encl. 19 and encl. 21, I found that the second respondent had carried out its duty according to law and there was no merit in the application and dismissed same. Indeed, I was convinced that the application constituted more of an appeal on facts rather than an application for review *via* an order for *certiorari.*

Though, in the statement it was contended by the applicant that the Industrial Court had "acted in error of law and in excess of jurisdiction," yet in many of the 20 grounds of application it was asserted that the Industrial Court had so acted due to its 'failure to hold' or 'to consider sufficiently or at all' certain pieces of evidence or a witness 'had been untruthful and lied', whilst such expressions smacks of language more consistent with an appeal on facts. Applying the legal guidelines laid down by the above case authorities, my

approach in the instant application is only to consider – in the light of the proper direction of law laid out by Federal Court in *Milan Auto Sdn Bhd v. Wong Seh Yen* [1995] 4 CLJ 449) which commended itself to me – whether the Industrial Court had considered the relevant essential fact matrix to enable it to determine whether the alleged misconduct had been established and whether the termination or dismissal was with or without just cause or excuse. It is also noted from para. 36 of the award that these two guiding principles were in the forefront of the Industrial Court Chairman's mind in his decision-making process. It is clear from the applicant's pleaded case and the oral and written arguments presented before me, that the Industrial Court had accepted or rejected the evidence of certain witnesses on pieces of evidence essential to the determination of the issue before him, and went on to make a finding based on such acceptance or rejection, and I am bound to accept such finding. To allow a review of findings of fact based on the credibility of witnesses is to allow this court to be used as a court of appeal in *certiorari* proceedings "as a cloak to entertain what, in truth, is an appeal against findings of fact". (See *William Jacks & Co. (supra)*).

Now, let us examine whether in the instant case, the Industrial Court had discharged its duties as enjoined by law. In my deliberations, I was also mindful of my views expressed in *Malayawata Steel Bhd v. Mohd Yusof b. Abu Bakar & Anor* [1994] 2 CLJ 239 (at p. 243) as follows:

> Surely s. 30(5) of the Act which requires the Industrial Court to 'act according to equity, good conscience and substantial merits of the case without regard to technicalities and legal form' entails that if there is some misconduct on the part of the workman, good conscience alone will require the court to enquire into and adjudicate on the justification for the employee's dismissal; such enquiry does not have to be with the full trappings of a criminal court trial.

The real thrust of the applicant's allegations against the first respondent may properly and more conveniently be captioned and discussed under three (3) headings, which I shall deal with separately: (a) misconduct; (b) poor performance; and (c) insubordination.

On Misconduct

The second respondent specifically dealt with and investigated in detail the allegations of misconduct of the first respondent as advanced by the applicant as its ground for the dismissal of the first respondent. The first allegation of misconduct is failing to prepare the organization chart. Based on the evidence before it, the second respondent concluded that the first respondent had submitted the organization chart to the draftsman who, unfortunately, had failed to print it out as he was busy; the draftsman was not called by the applicant to rebut this piece of evidence.

On the second allegation of misconduct in failing to prepare job descriptions, the second respondent made a finding of fact based on the evidence before it (see para. 16 of the award) that the general manager Pn Katijah Che Omar (COW1) said that she did not discount the possibility of the job descriptions being handed to her secretary Cik Azizah bt Baharom (COW2). And, the second respondent also found implicit acceptance by the applicant that the job description had been submitted to COW2 to be handed over to COW1.

On the third allegation of misconduct in failure to prepare a performance appraisal; the second respondent made a finding of fact, based on the evidence of COW2, that the performance appraisal was in fact handed over to COW2 to type but she had informed COW1 that she was unable to type as she was busy with other work; and COW1 had agreed to that by nodding.

The fourth allegation of misconduct is failure to punch the punch-card. The first respondent's testimony that the former general manager had given him permission not to punch the punch-card was not challenged or rebutted by the applicant. All averments made by the first respondent were not challenged or rebutted by the applicant as the latter company failed to call their former general manager. This again was a finding of fact. Further, the general manager (COW1) confirmed that if the first respondent's duty demanded, then he would have to go to the Labour and Industrial Departments on the mainland, or the district office in Langkawi, or visit the quarry or visit the Jetty from time to time. Thus, based on the above evidence the second respondent was fully justified in concluding that it was normal for the first respondent to come late on those occasions. The second respondent also concluded (at para. 27 to 29 of the award) that even though the general manager and operations manager En. Wan Zabidi Wan Omar were also guilty of not punching their punch-cards, no disciplinary action was taken against either of them; whereas in respect of the first respondent it was considered a gross misconduct justifying dismissal. Indeed, on this score, the second respondent found that the managing director did not set a good example when she did not do what she had preached.

Poor Performance

In paras. 37 to 40 of the award, the second respondent explained in great detail the necessary procedures to adopt in order to establish the charge of 'poor performance' – and found that none of such procedures was not carried out. And, it also found that the applicant company had failed to substantiate their allegation that the first respondent was a poor performer.

Insubordination

The second respondent had also directed its mind and made a specific finding (at paras. 33 to 35 of the award) that there was no act of insubordination on the part of the first respondent based on the evidence tendered before it.

In conclusion, I am fully satisfied that the Industrial Court had neither acted in error of law or in excess of jurisdiction, as it had:

(a) considered all the relevant essential pieces of evidence in order to enable it to determine whether, firstly, the alleged misconduct had been established, and secondly, whether the termination or dismissal was with or without just cause or excuse; and

(b) not taken into account any irrelevant consideration in arriving, at, and which had unduly affected, its conclusion.

And, any reasonable tribunal similarly circumstanced would have come to a like decision on the facts before it.

There was neither oral or written submission by the applicant's counsel on the ground 20 above – presumably this ground, pertaining to the nature and computation of the award as in para. 45, has been abandoned by the applicant. In the event, I had no alternative but to dismiss the applicant's application for the prerogative writ.